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No. 03-380

IN THE

Supreme Court of the United States

MANUEL DAVILA,

Petitioner,

v.

DELTA AIRLINES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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Petitioner respectfully submits this reply in further support of the petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

REASONS FOR GRANTING PETITION

I.

THE PETITION IS TIMELY

Petitioner timely filed its initial petition within 90 days of the entry of judgment from which review is sought. Because the petition was not in the right format, plaintiff was given additional sixty days from the date of the letter received from the Clerk of the Supreme Court to file the petition in the correct format. The substance of the initial petition is identical with petition filed in September, 2003 and was timely filed within 60 days of the date of the letter from the Clerk of the Supreme Court.

II.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE SUPREME COURT AND WITH OTHER CIRCUITS

The Respondent fails to address the two main points of the writ. The first point being that it was impossible to pursue the ADA claim at the time of the appeal under the Railway Labor Act. The reason being is that petitioner who was pro se before the EEOC was advised specifically that the EEOC proceeding was stayed pending the final outcome of the

arbitration process. Thus, it was *impossible to have commenced an ADA action* with the appeal of an arbitration decision under the Railway Labor Act. The second point was that petitioner had no choice but to commence his appeal of the arbitration decision due to the statute of limitations.

Thus, there was *not* a full and fair opportunity to litigate the issue in the prior lawsuit because Petitioner could not have brought the ADA claim without filing a charge of discrimination and receiving a right sue letter which it did not have nor could not obtain until the completion of the arbitration appeal process because of the EEOC stay.

Moreover the decision below cannot be reconciled with other cases directly on point in other circuits when deciding whether a federal judgment has a claim preclusive effect. The following cases stand for the proposition that there must be a full and fair opportunity to litigate the issue in the prior lawsuit. *Del. River Port Authority v. FOP Renn- Jersey Lodge 30*, 290 F.3d 567 (3rd Cir. 2002); *Maxim v. Dalton*, 48 F.3d 1228 (9th Cir. 1995); *Richardson v. The County of Merced*, 921 F.2d 281 (9th Cir. 1990); *Comeaux v. Uniroyal Chemical Corp.*, 849 F.2d 191 (5th Cir. 1988); and *Hill v. Coca Cola Bottling Co.*, 786 F.2d 550 (2nd Cir. 1986). The respondent has utterly failed to address how petitioner is able to have a full and fair opportunity to litigate his ADA claim when the EEOC stayed the filing of the charge and the investigation pending the final outcome of the arbitration. As a result, a plain reading of these cases applied to the instant case directly conflicts with the Eleventh Circuit holding in this case.

Further clarification regarding the circumstances of when an employee must bring a discrimination claim in Court is critical. ***The Eleventh Circuit holding abandons the full and fair opportunity test.*** The Eleventh Circuit does not apply the test. The Eleventh Circuit holding strips employees who have been a victim of discrimination in the workplace of a full and fair opportunity to have their claim heard in Court.

CONCLUSION

For the reasons set for above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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